Townsend v. *N. Y. C., etc. R.* (1874), 56 N. Y. 295; *P. F. W. & C. R.* v. *Slusser* (1869), 19 Ohio St. 157.

Where the plaintiff was delayed, but not otherwise damaged, $400 has not been held excessive: *T. W. & W. R.* v. *McDonough* (1876), 53 Ind. 289. In the same State $500 has been allowed for one day's delay: *P. C. & St. L. R.* v. *Hennigh* (1872), 39 Ind. 509; and $600, where a passenger was put off late at night, several miles from a station, and seven miles from his destination: *L. E. & W. R.* v. *Fix* (1882), 88 Id. 381.

Where a conductor wrongly supposed that a child, travelling on a half ticket, was of age to pay full fare, and insisted on ejecting him unless full fare were paid, and the mother left the train also, though told that her ticket was perfectly good, she was held entitled to recover damages on her own account as well as on that of the child: *Gibson* v. *E. T. V. & G. R.*, U. S. C. Ct., E. Dist. Tenn. (1887), 30 Fed. Rep. 904.

If a passenger has the money to pay his fare, his obstinate refusal to do so, and insisting on being ejected, will prevent a recovery on account of injury to his feelings: *Hall* v. *M. &c. R.*, *supra*; *Gibson* v. *E. T. V. & G. R.*, *supra*. And if the passenger resist, he cannot recover for bodily injuries received, unless wantonly inflicted: *Lillis* v. *St. L. K. Cy. & N. R.*, *supra*. If the conductor be honestly mistaken, and no excessive force be used, only actual damages are, as a general rule, recoverable: *Graham* v. *Pac. R.* (1877), 66 Mo. 536. But where the expulsion was from a horse-car, the passenger was allowed to recover for the injury to his feelings also, though not exemplary damages: *Hamilton* v. *Third Ave. R. Co.* (1873), 53 N. Y. 25.

If the act of the conductor be wanton, reckless, and oppressive, exemplary damages may be recovered: *Evans* v. *St. L. I. M. & S. R.* (1882), 11 Mo. App. 463; as where the plaintiff was put off at an unseasonable hour in the morning at a place where he suffered from exposure to the weather: *Hall* v. *S. C. R.*, S. Ct. S. C., March 20, 1888. In *L. S. & M. S. R.* v. *Rosenzweig* (1886), 113 Pa. 519, where the conductor showed utter disregard of the passenger's safety, and the latter was very severely injured, a verdict for $48,750 was sustained.

In *Phila. Traction Co.* v. *Orbann*, (1888), 119 Pa. 37; s. c. 27 AMERICAN LAW REGISTER, 338, the rule followed in the last-cited case is recognized as in accordance with the preponderance of authority, although its propriety is doubted.

CHAS. CHAUNCEY BINNEY.

Philadelphia.

RECENT AMERICAN DECISION.

Supreme Court of Alabama.

CHERRY ET AL. v. HERRING.

Where a deed was handed by the grantor to the grantee and both parties immediately went to the adjacent office of H. and the deed was there delivered to H. to hold until a sum of money should be paid, and H. then endorsed on the deed that it was an escrow, to be held until the payment, but the money was never paid and the deed not found; there was no delivery, and the deed did not become an executed conveyance.

APPEAL from the Circuit Court of Lee County.

The plaintiffs were non-suited in the Court below, in an action for the recovery of a tract of land, after the Court had refused to admit evidence that the common grantor, Thomas J. Stephens, had not delivered the deed to the defendant, but had deposited it as an escrow under the circumstances mentioned in the opinion (*infra*).

A. and *R. B. Barnes* and *George P. Harrison, Jr.*, for appellants.

J. M. Chilton, for appellee.

STONE, C. J., February 1, 1888. We do not question the doctrine, so firmly established, that a deed cannot be delivered to the grantee, to be held by him as an escrow, and to become valid and binding as a conveyance, only on the happening of an event to transpire afterwards: *Williams* v. *Higgins*, (1881), 69 Ala. 517; 1 Dev. Deeds, § 314; 3 Wash. Real Prop. (5th ed.), 317; *Ins. Co.* v. *McMillan* (1856), 29 Ala. 147; *Simonton's Estate* (1835), 4 Watts (Pa.), 180. It is certainly true that a paper, on its face a deed, though formally executed in all other respects, is nevertheless inoperative as a deed, if there has been no delivery to the grantee. Delivery, however, need not be positively proved. It is often inferred from circumstances, not the least frequent of which in its occurrence is the possession of the deed by the grantee. Many other acts or facts justify the presumption of delivery, but we need not enumerate them: 3 Brick. Dig. 298, §§ 25–27; 1 Dev. Deeds, §§ 260 *et seq.*; 1 Brick. Dig. 53; 3 Wash. Real Prop. (5th ed.), 304. When the testimony is indeterminate, the inquiry of delivery *vel non* is one of intention, to be determined by the jury: *Alexander* v. *Alexander* (1882) 71 Ala. 295; *Murray* v. *Stair* (1823), 2 B. & C. 82; 1 Dev. Deeds, §§ 262–263. The fact that the grantee acquired or at some time had the possession of the deed, unexplained, raises the presumption that it was delivered to him by the grantor, and that it thereby became operative as a conveyance. We have shown above that this presumption cannot be overturned by proving that it was delivered to him as an escrow, to become a conveyance on the happening of some future event.

The reason assigned for this ruling is, that, when a grantor delivers to a grantee a deed formally executed in all other respects, each of the two parties has then performed every act which he proposes to do, or can do, in reference to the execution of the paper; and these acts, without more, raise the legal presumption that the conveyance is fully executed. Doing, or not doing, the outside thing upon which the effect of delivery, as a complete execution of the deed, is to depend, is not a proposition to do anything further with the deed. The naked offer is to prove a contemporaneous oral agreement that, unless some outside collateral, unwritten stipulation is complied with by the grantee, then this possession shall, *ipso facto*, be treated as no proof of delivery, and the instrument as no deed. To allow this, would be to permit the legal effect of a deed, complete to all outside appearances, to be varied, and in many instances defeated, by oral proof of an agreement not embraced in the writing.

In the case we have in hand, the testimony offered would have tended to show that the deed was handed to Herring, the purchaser, at a point near Hooper's office, and the two parties then went in company to Hooper and delivered the deed to him; that Hooper indorsed on the deed that it was delivered to him as an escrow, to be delivered to Herring when $125 should be paid by Herring to or for Stephens; and that the money was never paid, and the deed was never afterwards in the hands of Herring. Hooper is dead and the deed was not produced. It has probably been destroyed or lost. This testimony, if received, would have tended to show the foregoing state of facts; that the delivery to Hooper was made by the consent of both parties, with the agreement and understanding which was expressed in his indorsement, and that the delivery of the deed by Stephens to Herring, if not made that the latter might inspect it, was at most made with the understanding that it should be carried to Hooper, and placed with him as an escrow.

We need not, and do not decide, what would be our ruling if Herring had kept the deed, and had never delivered it to Hooper. That question is not before us.

We do hold, however, that the testimony offered should

have been received; and if it proves that the delivery and deposit with Hooper were made as offered to be shown, and with the agreement and understanding that Hooper should hold the deed as an escrow, then the handing of the deed by Stephens to Herring was not a delivery, and the deed did not thereby become an executed conveyance. Left, as the deed was, with Hooper, Herring could not have obtained possession of it until some other act was done, namely, a delivery of it by Hooper. This presents all the elements of an escrow, not in Herring's possession, but in Hooper's. In *Gilbert* v. *Ins. Co.* (1840), 23 Wend. (N. Y.) 43, it was ruled that "leaving a deed in the hands of the grantee, to be by him transmitted to a third person, to hold in escrow until the happening of a certain event, is not a delivery to the grantee, so as to vest title in him;" s. c. and note, 35 Am. Dec. 543. The same doctrine is declared in *Fairbanks* v. *Metcalf* (1811), 8 Mass. 230, and in *Brown* v. *Reynolds* (1858), 5 Sneed (Tenn.), 639. This doctrine is asserted without disapprobation in Dev. Deeds, § 317; and in § 271, the same author says: "A delivery of a deed for inspection, or a delivery to the grantee or his agent, to be held while the grantee has under consideration the proposition whether he shall accept it or not, is not a valid delivery." And 3 Wash. Real Prop. (5th ed.) 317, says: "A deed can never be an escrow if delivered to the grantee himself, unless for the express purpose of being handed to another person." These principles we consider sound and conservative, and we adopt them. The rulings of the Circuit Court are in conflict with our views.

Reversed, nonsuit set aside, and cause remanded.

§ 1. *What may be delivered in Escrow.* Any kind of an instrument, having the essentials of a contract, may be delivered in escrow. The most familiar instance is that of an ordinary deed, but other instruments in escrow have been the subject of judicial decision, such as a sheriff's deed: *Jackson* v. *Catlin* (1807), 2 Johns. (N. Y.) 248; a promissory note: *Conch* v. *Meeker* (1817), 2 Conn. 302; *Foy* v. *Blackstone* (1863), 31 Ill. 538; *Bellows* v. *Folsom* (1866), 4 Robt. (N. Y.) 43; *Perry* v. *Patterson* (1844), 5 Humph. (Tenn.) 133; a bond: *Madison, etc. Plank Road Co.* v. *Stevens* (1857), 10 Ind. 1; a stock subscription: *Wright* v. *Shelby R. R. Co.* (1855), 16 B. Mon. (Ky.) 4; *Case Wagon Co.* v. *Wolfenden* (1885), 63 Wis. 185; a composition deed: *Johnson* v. *Baker* (1821), 4 B. & Ald. 440; and any instrument, even though

not under seal: *Seymour* v. *Cowing* (1864), 4 Abb. (N. Y.) App. 200; a mortgage: *Chipman* v. *Tucker* (1875), 38 Wis. 43; *Schmidt* v. *Deegan*, 69 Wis. 300.

§ 2. *Definition.* Etymologically, the word "escrow" means a "scroll." An old definition, and one much quoted, is as follows: "The delivery of a deed as an escrow is said to be, where one doth make and seal a deed and deliver it unto a stranger until certain conditions be performed, and then to be delivered to him to whom the deed is made, to take effect as his deed. And so a man may deliver a deed, and such a delivery is good. But in this case two cautions must be heeded: *first*, that the form of words used in the delivery of a deed in this manner, be apt and proper; *second*, that the deed be delivered to one that is a stranger to it, and not to the party himself to whom it is made:" Sheppard's Touchstone, 58.

This definition, as we shall elsewhere see, is not strictly correct, so far as it requires the delivery to be to a *stranger: Watkins* v. *Nash* (1875), L. R. 20 Eq. 262. A modern definition is that "an escrow is a deed delivered to a third person, upon a future condition to be performed by either party. It must be delivered to a stranger, and the conditions mentioned:" *Raymond* v. *Smith* (1825), 5 Conn. 555. As a description of an escrow, we have the following: "It is essential to an escrow that it be delivered to a third person to be by him delivered to the obligee or grantee, upon the happening of some event or the performance of some condition, from which time it becomes an absolute deed:" *James* v. *Vanderhuyden* (1829), 1 Paige, 387. Hence, where a deed was executed by H. and wife, and delivered as an escrow to M., who tendered it to the grantee, and, on refusal by the grantee to accept it, M. returned it to H., this did not constitute H. an agent for his wife, to hold the deed as an escrow, and, after her death, to make a valid delivery to the grantee. *Executors of Shoenberger* v. *Hackman* (1860), 37 Pa. 87.

§ 3. *Must be a completed Instrument.* It will be observed that the instrument put in escrow must be a completed one; that is, nothing so far remains to be done, touching the perfecting of the instrument, except delivery to the grantee or obligee. If it is a deed, it must be signed by the grantor, the grantee named, and the land intended to be conveyed, described; it must be as complete in *manual* execution as if it were to be placed in the hands of the grantee and title pass at once. If anything in this respect remains to be done, it is not a valid escrow. Not only this, but, back of the deed, must be a contract between the parties to it, definitely assented to by both of them, and requisite in all its parts to cover all that is essential to secure a conveyance of the land. Unless there has been a meeting of the minds sufficient for a contract of conveyance, there cannot be a deed put in escrow; for if it is attempted, it will be the act of one only: *Fitch* v. *Bunch* (1866), 30 Cal. 208.

§ 4. *To whom delivered.* It is elementary to say that a delivery of a deed or written contract is essential to its validity. This is true of an instrument delivered in escrow. But in all such instances of an escrow, the delivery must be to a person not a party to the instrument, a third person or stranger; as we have seen it stated, in the case of a deed, to some one else than the grantor or grantee. In fact, it may be broadly stated that there cannot be a delivery, in case of a deed, to the grantee, and

in case of a note, to the payee: *McCann* v. *Atherton* (1883), 106 Ill. 31; *Stevenson* v. *Cropnell* (1885), 114 Id. 19; *Stewart* v. *Anderson* (1877), 59 Ind. 375; *Deardorff* v. *Foresinon* (1865), 24 Id. 481; *Madison P. R. Co.* v. *Stevens, supra; Roche* v. *Roanoke Seminary* (1877), 56 Ind. 198; *Wright* v. *Shelby R. R. Co., supra; Jackson dem. Russell* v. *Rowland* (1831), 6 Wend. (N. Y.) 666; *Gilbert* v. *North American Fire Ins. Co., supra; Seymour* v. *Cowing, supra; Beers* v. *Beers* (1876), 22 Mich. 42; *Metcalf* v. *Van Brunt* (1862), 37 Barb. (N.Y.) 621; *Ordinary of N. J.* v. *Thatcher* (1879), 41 N. J. L. 403; *Foley* v. *Cowgill* (1838), 5 Blackf. (Ind.) 18; *State* v. *Chrisman* (1850), 2 Ind. 126; *Madison, etc. Plank Road Co.* v. *Stevens* (1855), 6 Id. 379; *Stephens* v. *Buffalo, etc. R. R. Co.* (1855), 20 Barb. (N.Y.) 332; *Miller* v. *Fletcher* (1876), 27 Grat. (Va.) 403. The last citation has an excellent discussion of old and modern cases and authorities. This is true, however, only of those instruments in which the conditional character of the instrument is not expressed in writing upon the face thereof; and only relates to those instruments where the condition rests in parol or an outside instrument: *McCann* v. *Atherton, supra; Wendlinger* v. *Smith* (1881), 75 Va. 309; *Hicks* v. *Goode* (1842), 12 Leigh (Va.), 479. An instrument in which the condition is not expressed therein, if delivered to the obligee, becomes operative at once, even though contrary to the intention of the parties thereto: *Foley* v. *Cowgill, supra; Bramon* v. *Bingham* (1863), 26 N. Y. 483; *Worrell* v. *Munn* (1851), 5 Id. 229: "A deed can only be delivered in escrow to a third person. If it be intended that it shall not take effect until some subsequent condition shall be performed, or some subsequent event shall happen, such conditions must be inserted in the deed itself, or else it must not be delivered to the grantee. Whether a deed has been delivered or not is a question of fact, upon which, from the very nature of the case, parol evidence is admissible. But whether a deed, when delivered, shall take effect absolutely, or only upon the performance of some condition not expressed therein, cannot be determined by parol evidence. To allow a deed, absolute upon its face, to be avoided by such evidence, would be a dangerous violation of a cardinal rule of evidence. The deed in this case being absolute upon its face, and having been delivered to the grantee himself, took effect at once. It could not have been delivered to take effect upon the happening of a future contingency, for this would be inconsistent with the terms of the instrument itself. Without regard, therefore, to any understanding which may have existed between the parties at the time the deed was delivered, it must be held to be an absolute conveyance, operative from that time:" *Lawton* v. *Sager* (1851), 11 Barb. (N. Y.) 349.

§ 5. *Rule modified.* This is the rule laid down in the old cases (and in Touchstone, as we have seen): *Thoroughgood's Case*, Hil. 9 Jac. 1, 9 Co. R. 137; *Whyddon's Case*, Trin. 38 Eliz., Cro. Eliz. 520; *Holford* v. *Parker* (*circa* 1620), Hob. 246, and other respectable authorities: *Hicks* v. *Goode, supra;* and a plea setting up a conditional delivery is bad: *Hawksland* v. *Gatchell*, Easter T. 42 Eliz., Cro. Eliz. 835; *Williams* v. *Green*, Trin. T. 43 Eliz. Id. 884; *Foley* v. *Cowgill, supra; Pyn* v. *Campbell* (1856), 25 L. J. Q. B. 279. But this rule has been somewhat modified by a recent case in England. In the case referred to, a reconveyance was executed by one of two trustee mortgagees expressly as an escrow, conditioned on payment of

the mortgage debt, and was left by him with his co-trustee. The co-trustee afterwards also executed the re-conveyance expressly as an escrow "upon the faith of an undertaking that the business should be forthwith settled," and handed the re-conveyance to the solicitor of the mortgagor. This was held to be a good delivery as an escrow, and the Vice-Chancellor said, as to the execution, by the first co-trustee: "It is said that the deed thus executed could not be called an escrow, because it was not delivered to a stranger, and that is, no doubt, the way in which the rule is stated in some of the text-books—Sheppard's Touchstone, for instance; but when those authorities are examined, it will be found that it is not merely a technical question, as to whether or not the deed is delivered into the hands of A. B., to be held conditionally; but, when a delivery to a stranger is spoken of, what is meant is a delivery of a character negativing its being a delivery to the grantee or to the party who is to have the benefit of the instrument. We cannot deliver the deed to the grantee himself, it is said, because that would be inconsistent with its preserving the character of an escrow. But if, upon the whole of the transaction, it be clear that the delivery was not intended to be a delivery to the grantee at that time, but that it was to be something different, then you must not give effect to the delivery as being a complete delivery, that not being the intent of the persons who executed the instrument." As to the execution by the second co-trustee, the Vice-Chancellor said he saw no difficulty in holding that, if it were a delivery to the solicitors acting for the mortgagor, "it was a delivery to him as an agent for all parties for the purpose of that delivery:" *Watkins* v. *Nash*, *supra*. Here, it will be observed, was a delivery to the solicitor acting for the grantee alone, and it was held a good escrow. This is certainly a modification of the doctrine of the old authorities; and goes further than a less recent case, that a deed might be delivered as an escrow to a solicitor acting for all the parties to it: *Millership* v. *Brookes* (1860), 5 H. & N. 797.

§ 6. *Delivery to Agent.*—Since another may act for one in his stead, or a man may perform an act by an agent, a delivery to an agent authorized to receive the deed is a delivery in law to the grantee himself, and it cannot be made an escrow: *Duncan* v. *Pope* (1872), 47 Ga. 445; *Weir* v. *Batdorf*, Supreme Court, Neb. 1888; *Worrall* v. *Munn*, *supra*; *Stewart* v. *Anderson*, *supra*; *Belleville*, *etc. Bank* v. *Bornman*, Supreme Court Ill 1886; *Madison*, *etc. Plank Road Co.* v. *Stevens*, *supra*; *Miller* v. *Fletcher*, *supra*. So a delivery to the grantor's agent will not put the instrument in escrow: *Weir* v. *Batdorf*, *supra*.

If the delivery is made to an officer of a corporation, with the intention of passing title, this is a delivery to the corporation itself, if such corporation is the grantee or obligee. But such an officer may act as the agent of both parties, and receive the deed in escrow; for there is no such personal identity between a corporation and its officers as will prevent a delivery to them as an escrow: *Southern Life Ins.*, *etc. Co.* v. *Cole* (1852), 4 Fla. 359; *Bank of Healdsburg* v. *Bailhache* (1884), 65 Cal. 327. "It is said that delivery to an officer or servant of a corporation is delivery to the corporation. To this we assent, with the addition that such delivery is for the use and benefit of the corporation, and with intent to pass an absolute property or interest in the deed delivered; and the rule would be the same, if the delivery

should be made to a mere stranger. We do not think that there is such a personal identity between the corporation and its officers that a deed may not be placed in the hands of the latter as an escrow until the performance of some condition," etc.: *Southern Life Ins., etc. Co.* v. *Cole, supra.* So where one may act as the agent of both parties, he may hold the deed in escrow; but an absolute delivery to an officer of a corporation cannot be *afterwards* modified so as to put the instrument in escrow; the effect of the act can never be changed: *Cincinnati, etc. R. R. Co.* v. *Iliff* (1862), 13 Ohio St. 235. A deed may be delivered to arbitrators for their disposal, as they shall award the title: *Peck* v. *Goodwin* (1786), Kirby (Conn.), 64.

§ 7. *Transmission to Holder by Grantee.*—The question arises, can the grantee, or obligee, act as an agent to carry or transmit the deed to the person who is to hold it in escrow? This has been answered in the affirmative: *Gilbert* v. *North American, etc. Ins. Co., supra.* "The deed, as well as the mortgage, was left in the hands of Nottingham (the grantee), *to be forwarded to Babcock*, the depositary. It was not put into the hands of the grantee to keep, *but merely as a mode of transmission to Babcock*, as was well said by the Judge on the trial. There was neither any formal delivery, nor any intent that the grantee should take it as the deed of the grantor. Nottingham received it, not as *grantee*, but as the *agent* of the grantor for a special purpose; and I see no good reason why he could not execute that trust as well as a stranger. He did execute it with fidelity, and the deed still remains with the depositary agreed on by the parties:" Id. Here it will be observed that the deed had reached the hands of the depositary, when the point was raised. Suppose the grantee had retained the deed, denying the condition, and claiming an absolute delivery, what then? In such an event the delivery would be held to be absolute, and parol evidence not admitted to show the conditional delivery: *Bramon* v. *Bingham, supra; Jackson* v. *Sheldon* (1843), 22 Me. 569; *Brown* v. *Reynolds, supra; Simonton's Est., supra; Murray* v. *Stair, supra; Den* v. *Partee*, 2 Dev. & Bat. (N. C.) 530; *Wright* v. *Shelby R. R., supra.*

§ 8. *Words of Delivery.*—By some of the old authorities the word "escrow" must be used to make the delivery a good one in escrow; such as "I deliver this deed in escrow upon the condition," etc. But this rule has long since been exploded: *Nottebeck* v. *Wilks* (1857), 4 Abb. Pr. (N. Y.) 315; *Gilbert* v. *North American, etc. Ins. Co., supra.* But the words used and the intention of the parties must show that it is a conditional delivery, such a condition as the law permits the parties to agree upon: *Jackson dem. Russell* v. *Rowland, supra.* If the grantor or obligor retain by agreement control over the instrument, it is not an escrow; for the depositary is only the agent of the grantor, and not of both, as the law requires: *Loubat* v. *Kipp* (1860), 9 Fla. 60; *Arnold* v. *Patrick* (1837), 6 Paige (N. Y.), 310; *Carrick* v. *French* (1846), 7 Humph. (Tenn.) 459; *Johnson* v. *Branch* (1851), 11 Id. 521; *Ordinary of N. J.* v. *Thatcher, supra; Evans* v. *Gibbs* (1846), 6 Humph. (Tenn.) 405; *Groves* v. *Tucker* (1848), 18 Miss. 9. "There was nothing agreed to be done by or on the part of the grantee as the condition upon the performance of which the deed was to become absolute, and to be delivered to him by the third person. It is the general rule that a deed delivered to a third person is viewed as an escrow

only in case it is agreed that the deed is to be delivered to the grantee, upon the performance by him of the stipulated condition: *Fitch* v. *Bunch*, *supra*. See *Clark* v. *Gifford* (1833), 10 Wend. (N. Y.) 310; *White* v. *Bailey* (1841), 14 Conn. 271; *Currie* v. *Donald* (1794), 2 Wash. (Va.) 58; *White* v. *Williams* (1836), 3 N. J. Eq. 376.

§ 9. *Whether an Escrow or Present Deed.*—It is often difficult to determine whether a deed is delivered in escrow or not. A modern authority, recognizing this difficulty, sums up what he considers the doctrine of the cases on this point as follows: "If the payment of money, or the performance of some other condition, is the circumstance upon which the future delivery is to depend, the instrument is an escrow; but where the future delivery does not depend upon the performance of any condition, but it is deposited with a third person merely to await the lapse of time or the happening of some contingency, it will be deemed the grantor's deed presently:" Devlin on Deeds, § 319, citing *Hathaway* v. *Payne* (1865), 34 N. Y. 92; *Foster* v. *Mansfield* (1841), 3 Met. (Mass.) 412; *Wheelwright* v. *Wheelwright* (1807), 2 Mass. 447; and saying in a note, "but see *Stone* v. *Duvall* (1875), 77 Ill. 475, where a deed of this kind was considered rather to be an escrow." Commenting further upon this subject, the same author says: "This distinction is material, because, if it be an escrow, no title passes to the grantee until the second delivery, while, if it be a present deed, the title, upon the happening of the contingency, or upon the lapse of the specified time, passes by relation from the time the instrument was placed in the hands of the depositary or trustee. As the intent of the parties is the point to be ascertained, each case must be decided upon its own peculiar circumstances, upon the language employed, the situation of the parties, the object to be attained, and such other facts as may throw light upon the intention of the parties:" § 320. In this he is clearly sustained by a quotation from *Hathaway* v. *Payne*, *supra*. See *O'Kelly* v. *O'Kelly* (1844), 8 Met. (Mass.) 436; *Murray* v. *Stair*, *supra*; *Shaw* v. *Hayward* (1851), 7 Cush. (Mass.) 170; *Cook* v. *Brown* (1857), 34 N. H. 460; *Hunter* v. *Hunter* (1853), 17 Barb. (N. Y.) 25; *Goodell* v. *Pierce* (1842), 2 Hill (N. Y.), 659; *Tooley* v. *Dibble* (1842), 2 Id. 641; *Ruggles* v. *Lawson* (1816), 13 Johns. (N. Y.) 285; *Price* v. *Pittsburgh, etc. R. R. Co.* (1864), 34 Ill. 13.

§ 10. *Grantor Retaining Control over Instrument.*—"An essential characteristic and indispensable feature of every delivery, whether absolute or conditional, is that there must be a parting with the possession, and of the power and control over the deed by the grantor, for the benefit of the grantee *at the time of delivery:*" *Prutsman* v. *Baker* (1872), 30 Wis. 644. For if he retains any control over it, it is not an escrow, notwithstanding it has been delivered to a third person with instructions to deliver it to the grantee or obligee upon the performance of some condition, or the happening of some event: *Campbell* v. *Thomas* (1877), 42 Wis. 437. In case of a true delivery in escrow the grantor has no control over the instrument delivered: *Welborn* v. *Weaver* (1855), 17 Ga. 267.

§ 11. *Gift.*—In case of a gift, the rule just referred to seems to be different. Thus, where a deed was placed as an escrow in a third person's hands, upon condition that it must first be signed and acknowledged by the grantor's wife, and not be delivered until the grantee executed a

mortgage, as the grantor called it, securing to him and his wife a life estate in the premises, and the custodian, without authority, placed the deed on record, after the grantor's death, it not having been signed by the wife nor any mortgage delivered, it was held that the heirs of the grantee could maintain an action to have it set aside. "It was his (the grantor's) privilege to judge for himself whether the terms upon which he was willing to deliver the deed to his property as a donation had been performed. The scrivener in whose custody the deed was left, was not invested with any discretion in regard to it. He had no authority to deliver it until the grantor was satisfied it should be. Being a voluntary conveyance without consideration, the grantor was at liberty at any time to withdraw the deed from the possession of the custodian, and the grantee could have no just cause to complain. The grantor was under no legal obligation to complete the donation:" *Hoig* v. *Adrian College* (1876), 83 Ill. 267.

§ 12. *Conditions Allowed.* — "The condition may consist in the payment of money as well as in the performance of any other act:" *Jackson* v. *Catlin, supra*. It seems useless to multiply citations upon this point. Of course no immoral or illegal condition could be insisted upon; and if the performance of such an act were the condition of the escrow, it would be an absolute delivery, perhaps, the condition being void.

§ 13. *Party in whom title is vested.*— While the deed is held in escrow, and before performance of the condition, or happening of the event, the title to the land remains in the grantor: *Harkreader* v. *Clayton* (1879), 56 Miss. 383; *Patrick* v. *McCormick* (1880), 10 Neb. 1; see *Bailey* v. *Crim* (1879), 9 Biss. 95.

§ 14. *Judgment against Grantor.*— The title remaining in the grantor, a judgment taken against him before the second delivery, is a lien upon the land: *Jackson dem. Russell* v. *Rowland, supra*. But if necessary to protect intervening rights of the grantee, it will be held that the deed took effect at the first delivery: *Shirley* v. *Ayres* (1846), 14 Ohio, 307; *Block* v. *Hoyt* (1877), 33 Ohio St., 212; *Price* v. *Pittsburgh, etc. R. R. Co., supra*.

§ 15. *When title passes.*—The title to the real estate only passes upon the happening of the event or the performance of the conditions upon which it was delivered: *Conch* v. *Meeker, supra; Daggett* v. *Daggett* (1887), 143 Mass. 516; *County of Calhoun* v. *American Emigrant Co.* (1876), 93 U. S. 124; *Jackson dem. Russell* v. *Rowland, supra*. No formal delivery by the agent holding the deed to the grantee is necessary: *Conch* v. *Meeker, supra*. "The title only passes on performance of the condition or the happening of the event, except in certain cases, where, by fiction of law, the writing is allowed to take effect from the first delivery:" *Prutsman* v. *Baker, supra*.

§ 16. *Delivery enforced.*—A Court of Equity, on the performance of the condition or happening of the event, will compel a delivery of the deed by the depositary of the grantee: *Stanton* v. *Miller* (1873), 65 Barb. (N. Y.) 58; *Schmidt* v. *Deegan, supra*. See *Shirley* v. *Ayres, supra; Knopf* v. *Hansen* (1887), 37 Minn. 215. This is true of the grantor, if he wrongfully obtains possession of the deed thereafter: *Regan* v. *Howe* (1876), 121 Mass. 424. The destruction of the deed by the grantor does not prevent the title vesting in the grantee: Id.

The Supreme Court of Kansas, on November 10, 1888, declared, in deciding the case of *Hughes* v. *Thistle-*

wood, which was an action to compel the delivery of a deed of the homestead, "that the wife, by intrusting the delivery of the deed to her husband after its due execution, authorized him to arrange the details of receiving payment and consummating the delivery; that the placing of the deed in escrow until the draft was converted into money was a step in the delivery of the deed, and the signature of the wife to the stipulation respecting the same was unnecessary to a conveyance of the property; and, further, that when the condition of deposit was accomplished it was the duty of S. to deliver the deed, and the attempted detention of the same would not prevent it from taking effect." The case was this: A tract of land, occupied by H. and his family as a homestead, was sold to T., and H. and his wife executed a deed, which H. presented to T. T. drew a draft on New York for the purchase-money, and the draft and deed were placed in the hands of S. as a depositary, under a stipulation that he should deliver the deed when the draft was collected, and that H. should furnish an abstract showing good title to the property sold in him. The stipulation was signed by H. and T., but not by the wife of H. The money was collected on the draft in due course of mail, and within about eight days; and after some further delay in an attempt to rectify defects in the title disclosed by the abstract, T. demanded the deed, but in the mean time H. had notified S. not to deliver the same.

§ 17. *Relation back to first Delivery.*— There are instances in which it will be held that a deed in escrow takes effect, by relation, from the time of its first delivery, in order to prevent a failure of justice, or the intentions of the parties. "This relation back to the first delivery is permitted, however, only in cases of necessity and where no injustice will be done, to avoid injury to the operation of the deed from events happening between the first and second delivery; as, if the grantor, being a *feme sole*, should marry, or whether a *feme sole* or not, should die or be attainted after the first and before the second delivery, the deed will be considered as taking effect from the first delivery, in order to accomplish the intent of the grantor, which would otherwise be defeated by the intervening incapacity. But subject only to this fiction of relation in cases like those above supposed, and others of the kind, which is only allowed to prevail in furtherance of justice and where no injury will arise to the rights of third persons, the instrument has no effect as a deed, and no title passes, until the second delivery; and it has accordingly been held, that if, in the mean time, the estate should be levied upon by a creditor of the grantor, he would hold by virtue of such levy, in preference to the grantee in the deed:" *Prutsman* v. *Baker*, *supra*. The better doctrine seems to be that the title passes at the time performance is made or the contingent event happens: 1 Devlin on Deeds, § 331. So far as the *capacity* of the grantor is concerned, it takes effect from the first delivery: 2 Wharton on Cont. § 679. Husband and wife executed a deed and placed it in escrow until the purchase-money was paid. Before that event, the wife died and the husband re-married. The claim of the second wife to dower, at his death, was denied, being taken away by relation of the deed back to the time of its delivery in escrow: *Vorheis* v. *Ketch* (1871), 8 Phila. (Pa.) 554. To a like point, see *Beekman* v. *Frost* (1820), 18 Johns. (N. Y.) 544; s. c. 1 Johns. Ch. 297; *Stanley* v. *Valentine* (1875), 79 Ill. 544.

§ 18. *Death of Grantor before second Delivery.*—If the grantor die while the deed is in escrow, before the performance of the condition or the happening of the event, the deed will take effect from the time of its first delivery, by relation, in order to prevent a failure of justice: *Jackson dem. Russell* v. *Rowland, supra.* In this case, such relation back was denied, where the object was to avoid an intervening judgment: *Latham* v. *Udell* (1878), 38 Mich. 238; *Welborn* v. *Weaver, supra;* see *Graham* v. *Graham* (1791), 1 Ves. Jr. 272; *Hill* v. *Hill*, 119 Ill. 242. The condition may be performed after death: *Lindley* v. *Groff* (1887), 37 Minn. 338. But, if the grantor retained any control over the deed, so as to prevent its being a strict escrow, no title will pass, for lack of delivery during the grantor's life: *Ball* v. *Foresman* (1881), 37 Ohio St. 132; *Cook* v. *Brown* (1857), 34 N. H. 460; *Prutsman* v. *Baker, supra; Citizens' Nat. Bank* v. *Dayton* (1886), 116 Ill. 257. So, no title will pass if the Act to be performed was not to be completed until after the death of the grantor: *Taft* v. *Taft* (1886), 59 Mich. 185; *Stone* v. *French*, 37 Kan. 145. But there is a line of cases which hold that, if the grantor execute the deed and deliver it to a third person to deliver it to the grantee, after his (the grantor's) death, it is a good deed, and the title passes only upon the second delivery, vesting, by relation, as of the time when the deed was left for delivery with such third person. But it will be observed that these are instances where the grantor has parted with his control over the deed: *Hathaway* v. *Payne, supra; Prutsman* v. *Baker, supra; Cook* v. *Brown, supra.* While a deed was in escrow, the grantor died, and his heirs gave a deed to the grantee, who paid the purchase-money to the administrator. It was held that he held it as an individual for the heirs, and not as administrator: *Teneick* v. *Flagg* (1860), 29 N. J. L. 25.

§ 19. *Intention of parties that titles should pass.*—If it is the intention of the parties that the title, after the performance of the condition, should date from the first delivery, it will be so considered: *Price* v. *Pittsburgh, etc. R. R. Co., supra.*

§ 20. *Performance.*—The condition to be performed must be one that the grantee is to perform, and not the grantor, to make it an escrow; for if it was to be performed by the grantor, the deed would be within his control, and not an escrow: *White* v. *Williams, supra.* So the grantee is not entitled to the deed until he has complied with the terms of the contract; "a strict compliance with the terms of the agreement" on his part must be made: *Dyson* v. *Bradshaw* (1863), 23 Cal. 528; *Beem* v. *McKusick* (1858), 10 Id. 538; *Demesney* v. *Grovelin* (1870), 56 Ill. 93; *Skinner* v. *Baker* (1875), 79 Id. 496: *Eichlor* v. *Holroyd*, 15 Bradw. (Ill.) 657. The condition must be literally fulfilled: *Himmon* v. *Booth* (1839), 21 Wend. (N. Y.) 267; *Abbott* v. *Alsdorf* (1869), 19 Mich. 157. "Until the condition is performed, the deed is of no more force than it would have been if the grantor, after signing and sealing the instrument, had deposited it in his own desk:" *Smith* v. *South Royalton Bank* (1859), 32 Vt. 341. The grantee is bound to perform the condition, or respond in damages: *Hicks* v. *Goode, supra.*

§ 21. *Grantee obtaining possession of deed wrongfully.*—If the grantee obtain possession before performance, or the happening of the event, without the consent of the grantor, even with the consent of the depositary, he gets no title to the instrument, nor to the land conveyed: *Harkreader* v. *Clayton* (1879), 56 Miss. 383; *Patrick* v. *Mc-*

Cormick, supra; Bailey v. *Crim, supra; Wheelwright* v. *Wheelwright, supra.* Such a deed will be declared void at the suit of the grantor: *Abbott* v. *Alsdorf, supra.*

The grantor is not estopped from setting up its invalidity by the fact that he had acted upon the belief that the condition had been complied with before delivery: *Robbins* v. *Magee* (1881), 76 Ind. 381.

§ 22. *Bona fide purchasers.*—There is some little conflict in the decisions, whether a *bona fide* purchaser from a grantee who has wrongfully obtained possession of the deed from the depositary, will be protected or not. There is a strong line of authorities which hold that such a purchaser gets no title: *Cotton* v. *Gregory* (1880), 10 Neb. 125; S. C. 19 AMERICAN LAW REGISTER, 694; *White* v. *Core* (1882), 20 W. Va. 272; *Black* v. *Shreve* (1860), 13 N. J. Eq. 455. "Cortmel, the third person in whose hands it was placed as an escrow, did not, in fact, deliver it as a deed. And he had no power to do so, had he attempted to make such delivery, the event not having transpired upon which he was authorized to make it. No delivery having been made then, the deed was never executed to the railroad; for delivery is a material part of the execution of a written instrument; and, the deed not having been executed, no title passed, for title to lands is conveyed by executed deeds:" *Berry* v. *Anderson* (1864), 22 Ind. 36. "The deed not having been delivered, it was a nullity and void, or, more properly speaking, *never executed*, and must be tainted with the fraud of Rolfe, which goes to the very existence of the instrument, into whosesoever hands they may come. It is not like the cases where the *fraud is collateral*, as where the instrument has become a perfect one, and it is appropriated fraudulently to a use different from the one for which it was created:" *Smith* v. *Bank of South Royalton, supra; Everts* v. *Agnes* (1855), 4 Wis. 343; *Crocker* v. *Bellanger* (1858), 6 Id. 645; *Peter* v. *Wright* (1855), 6 Ind. 183; *Fraser* v. *Davie* (1878), 11 S. C. 56; *Illinois Cent., etc. R. R. Co.* v. *McCullough* (1871), 59 Ill. 166; *Cagger* v. *Lansing* (1870), 57 Barb. (N.Y.) 421; *People* v. *Bostwick* (1865), 35 N. Y. 450; *County of Calhoun* v. *American Emigrant Co., supra; Abbott* v. *Alsdorf, supra; State Bank* v. *Evans* (1835), 15 N. J. L. 155; *Roberts* v. *Mullenix* (1872), 10 Kan. 22; *Boyle* v. *Boyle* (1879), 6 Mo. App. 594; *Chicago, etc. Land Co.* v. *Peck* (1885), 112 Ill. 408, 447; *Chipman* v. *Tucker, supra.* But the grantor cannot insist upon recognizing the grantee's possession of the instrument as valid for some purposes, and disclaim it as nugatory for all others, especially when to do so would be an injury to an innocent party: *Cotton* v. *Gregory, supra.* See, generally, *Harkreader* v. *Clayton, supra, Ogden* v. *Ogden* (1854), 4 Ohio St. 182.

But where the grantor placed the grantee *in possession*, it was held, while fully acknowledging the rule as above stated, that the purchaser from the grantee obtained a good title in equity upon the ground that the grantor had been negligent, and upon the further ground, that where one of two innocent parties must suffer, "he must be the sufferer who put it in the power of the wrongdoer to cause the loss;" or "where one of two innocent parties must suffer, he through whose agency the loss occurred must sustain it:" *Quick* v. *Milligan* (1886), 108 Ind. 419; *Bailey* v. *Crim, supra.* The general rule has been denied: *Blight* v. *Schenck* (1849), 10 Pa. 285.

§ 23. *Proof of Condition.*—"The condition upon which a deed is delivered in escrow may be expressed in writing

or rest in parol. The rule that an instrument or contract made in writing *inter partes*, must be deemed to contain the entire engagement or understanding, has no application: *Stanton* v. *Miller* (1874), 58 N.Y.192. Of course parol evidence is admissible to prove a condition resting in parol: *Madison, etc. Plank Road Co.* v. *Stevens, supra.* See *Foy* v. *Blackstone* (1863), 31 Ill. 538; *Brown* v. *Gilman* (1819), 4 Wheat. 255; *Koons* v. *Ferguson* (1865), 25 Ind. 388; *Freeland* v. *Charnley* (1881), 80 Ind. 132; *Campbell* v. *Thomas, supra.*

§ 24. *Statute of Frauds.*—"Where a promise is so far executed that a deed is delivered under it conditionally, it is taken out of the Statute of Frauds when the condition is fully performed, for, upon the performance of the condition, the deed becomes effective and the grantee is entitled to it:" *McCasland* v. *Ætna Life Ins. Co.* (1886), 108 Ind. 130. "But we have not discovered a single case in which it has been held, that one who has deposited a deed of land with a third person, with directions to deliver it to the grantee on the happening of a given event, but who has made no valid executory contract to convey the land, may not revoke the directions to the depositary and recall the deed at any time before the conditions of the deposit have been complied with; provided those conditions are such that the title does not pass at once to the grantee upon delivery of the deed to the depositary:" *Campbell* v. *Thomas, supra*, doubting *Thomas* v. *Sowards* (1870), 25 Wis. 631. So, it is held that a parol contract of sale of lands cannot be enforced simply from the fact that a deed for them was placed in escrow; that an escrow is not sufficient to take the sale out of the Statute of Frauds: *Freeland* v. *Charnley, supra;* disapproving 3 Wash. on Real Prop. 303, and *Cagger* v. *Lansing, supra*, overruled in *Cagger* v. *Lansing* (1871), 43 N. Y. 550. To same effect, Reed on Statute of Frauds, § 388; *Redding* v. *Wilkes* (1791), 3 Bro. Ch. 400; *Bissell* v. *Farmers' Bank* (1853), 5 McLean, 495; *Sanborn* v. *Sanborn* (1856), 7 Gray (Mass.), 142; *Underwood* v. *Campbell* (1843), 14 N. H. 393; *Weir* v. *Batdorf*, *Patterson* v. *Underwood* (1868), 29 Ind. 607. Instruments delivered to another on condition that other parties are to sign them before they are binding, are not delivered in escrow; they are incomplete instruments, and the doctrine of escrow is not strictly applicable to them: *Berry* v. *Anderson, supra.*

W. W. THORNTON.

Crawfordsville, Ind.

Supreme Court of Texas.

KASLING ET AL. *v.* MORRIS.

An offer to pay a reward for the detection of a criminal, is binding upon the private citizen making it, when acted upon.

It is not part of the official duty of a constable, who has not seen the commission of an offence, and has not any information as to the criminal, and has no warrant, to search a man (casually met on the road) upon mere suspicion.

APPEAL from the District Court of Cass County.

On the 10th day of March, 1886, at night, the storehouse